BEFORE
THE ILLINOIS COMMERCE COMMISSION

NORTH COUNTY COMMUNICATIONS CORPORATION,	)	
Complainant,	)	Docket No. 02-0147
vs.	)	
VERIZON NORTH, INC., and VERIZON SOUTH, INC.	)	
Respondents.	)	

NORTH COUNTY COMMUNICATIONS CORPORATION'S

INITIAL CLOSING BRIEF

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I
INTRODUCTION.

"If you don't like it, go sue us." – correspondence from Steven H. Hartmann to Joseph G. Dicks. Ex. S to NCC 2.

And so we did.

In direct response to the express invitation of Verizon's Senior Counsel for Carrier Relations, North County Communications Corporation ("North County") initiated this litigation against Verizon North, Inc. and Verizon South, Inc. (collectively, "Verizon Illinois") on February 15, 2002, pursuant to sections 13-514, 13-515, and 13-516 of the Illinois Public Utilities Act. Section 13-514 governs prohibited actions of telecommunications carriers which have the effect of impeding the development of

competition in *any* telecommunications market. The statute contains a long list of *per se* impediments to competition, such as unreasonably delaying interconnections, denying a request of another carrier for information regarding technical design and traffic capabilities, delaying the access of any person to another carrier, and by incorporation of section 13-801, failing to provide interconnection in any manner technically feasible to the fullest extent possible in order to maximize development of competitive telecommunications services offering[1], taking into account what affiliates have deployed in other jurisdictions. But significantly, the statute does not limit the Commission to consideration of the enumerated impediments. Instead, it expressly directs the Commission to consider "other actions which impede competition," as well.

So its position is clear, North County has maintained from the outset, that Verizon has employed a policy of refusing to interconnect with other carriers, in general, and with North County, in particular, at Verizon locations where sufficient capacity exists, instead requiring the construction of dedicated facilities before interconnection will take place. Ultimately, the Commission is not required to so find in order to find in North County's favor and to award North County its considerable attorney's fees. Cast in a light most favorable to Verizon, the best that can be said about what Verizon portrays as a "simple miscommunication" is that Verizon assigned as the gatekeeper to its network a company representative lacking the requisite education, training and support to perform her (Dianne McKernan) vital duties in a competent manner and allowing her to issue edicts which have the intended effect of

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[1] In seeking to open local exchange telecommunications markets to competition, Congress enacted the Telecommunications Act of 1996. Congress intended to encourage new entrants with new services and new ideas about how to provide these services to enter the local market, all with the idea that this would be good for consumers. AT&T v. Iowa Utilities Board, 525 U.S. 366, 371, 119 S.Ct. 721, 726 (1999). It was not Congress's intent that the local monopoly should dictate to new entrants how they would do business.

impeding competition, an effect that certainly amounts to "unreasonable" conduct, the standard by which Verizon's conduct must be judged. Ill. P.U.A. § 13-514

II

VERIZON MAINTAINS A POLICY OF PROVIDING

INTERCONNECTION TO CARRIERS ONLY AT DEDICATED FACILITIES.

Conceding that North County was entitled to rely upon its account manager for information, to believe that she was being truthful, to count on its account manager to get the correct information in response to inquiries, and that she was not exceeding her authority in responding to the Mr. Lesser's questions, Verizon's "independent consultant" nonetheless concluded that this litigation was simply the result of Dianne McKernan's "miscommunication" due to her "not being perfect," along with North County "jumping the gun" in a race to the courthouse. Tr. 577, 578, 581-582, 594, 601. NCC 5, Request for Admission No. 1.06. In addition to being wrong, Ms. Allison's conclusions are simply irrelevant to the proper resolution of this dispute.[2]

Following a long and brutal battle resulting in North County's ultimate interconnection in West Virginia, and armed with the knowledge which that experience provided him (See, NCC 1 at C-001–

[2] If the truth be told, the majority of Ms. Allison's pre-filed testimony was little more than an opportunity for Verizon to feed the Commission the company line through a living witness, full of personal opinions that do not meet the standard of competent expert opinions.

Verizon went to great lengths in its pre-filed testimony and at the hearing to attempt to shift the blame for this dispute to Mr. Lesser. The Commission must reject these attempts to distract it from the focus of this matter: Verizon's violation of section 13-514 of the Illinois Public Utilities Act.

Numerous other red herrings were awash in Verizon's case. For example, Verizon attempted to attach some significance to the purported absence of formal complaints from other competitive carriers; North County is not bound by, nor should the Commission be influenced by other carriers' lack of understanding of Verizon's obligations under the Telecommunications Act of 1996 and the Illinois Public Utilities Act, their willingness to accept same, or their financial decisions not to hold Verizon accountable.

C031, Tr. 327, 331), North County began the process of expanding into Illinois. NCC 1 at C-032. **Armed with the knowledge of the same history between the parties, Ms. McKernan informed Mr. Lesser, flat out and in no uncertain terms, that the policy in Illinois was the same and Verizon *would not* use the same facilities for North County that it would for a retail customer**. NCC 1 at C-033, C-0036. NCC 5, Response to Interrogatory No. 2. While Verizon feigned confusion and attempted to portray Ms. McKernan as a mere intermediary, she is the sole intermediary who counts when North County, or any other CLEC to whom she has been assigned, has to deal with any Verizon entity. Tr. 383, 582, 676. It is her job to be clear when she is conveying the company line and if there truly were any confusion over the matter, sole fault lies with Verizon.

Despite Ms. McKernan's willingness to "take a bullet" for Verizon Illinois and her claim to have coined the phrase "dedicated entrance facility" (Tr. 687), in fact the record is replete with examples confirming Verizon's illegal policy[3] from individuals *other than* Ms. McKernan. The phrase "dedicated entrance facility" was a topic of discussion during the initial planning meeting for North County's interconnection in West Virginia, back in January of 2001. Tr. 641-642, 669. Ironically, even one of Verizon's experts in the Core case in Maryland, David Visser, attempted to defend why Verizon uses "dedicated entrance facilities for interconnection rather than outside plant facilities."

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[3] Ms. McKernan defines "policy" as "that's the way we do business here." Tr. 667. Merriam-Webster defines "policy" as follows:

1 a : prudence or wisdom in the management of affairs **b :** management or procedure based primarily on material interest
2 a : a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions **b :** a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body

(Emphasis added.) Tr. 687-688. NCC 2, Ex. Q, p. 5. Ms. McKernan was not confused. She was not making up terms. She was conveying the company line, the "policy."

The initiation of this litigation bears a direct connection to this company line, and in that limited respect, had nothing to do with Ms. McKernan. On February 11, 2002, North County's counsel, Joseph G. Dicks, wrote to Verizon's Senior Counsel for Carrier Relations, Steven H. Hartmann, regarding Verizon's desire to move its interconnection trunks in Charleston, WV off of a "shared Outside Plant end user facility" and onto a "dedicated entrance facility." Given the difficulties which North County was experiencing in getting "turned up" in other jurisdictions (including Illinois), North County wished to establish a protocol similar to that envisioned in
West Virginia: get North County turned up as soon as possible at a retail facility and migrate the trunks over to the newly-constructed dedicated facility, once completed. NCC 2, Ex. T.

Seemed reasonable enough.

Verizon would have none of it.

In NCC, Ex. S, Mr. Hartmann points out that "Verizon did not agree to place initial interconnection traffic destined to NCC onto a shared end-user outside plant facility, but rather onto a newly-built, dedicated NCC inter-office carrier facility." Mr. Hartmann, whose authority includes Illinois (Tr. 549), laid out Verizon's position that Verizon's agreement to establish interconnection at an existing OSP facility was only because North County was on the verge of losing its prefixes and was done as a purported "courtesy"[4] to North County.

Mr. Hartmann's letter continued:

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[4] If not a "policy", then NCC did not need a "courtesy" exception, did it?

NCC's position is also inappropriate because it makes no sense legally or from a network perspective. **If NCC wants to litigate and/or arbitrate in Illinois or some other jurisdiction over what the "appropriate protocol" for interconnection should be, it should tee up the issue in *that* jurisdiction, *not* hold Verizon's network hostage in an attempt to extort concessions elsewhere**. Indeed, backing out on NCC's agreement to cooperate with Verizon to move its interconnection trunks to the dedicated facility in West Virginia is a transparent litigation strategy that only serves to highlight why **Verizon *should not* make special exceptions for NCC in the future.** (Bolding added, italics in original.)

The letter makes clear any number of critical points:

- (a) Given Verizon's portrayal of Ms. McKernan as a mere intermediary, as well as her claim that she coined the relevant phrase, a simple reading of Mr. Hartmann's letter reveals how absurd it is to think she had anything whatsoever to do with Mr. Hartmann's inclusion of references to "dedicated facilities" or "dedicated entrance facilities" numerous times throughout his letter;
- (b) It is Verizon who invited this litigation, not North County[5];
- (c) If there were no policy against the arrangement North County sought, then indisputably there would be no reason to be making "special exceptions"; the fact that special exceptions exists means, *ipso facto*, that the policy exists; and
- (d) The fact that North County apparently received a "special exception" in getting

[5] Although not entirely clear, Verizon appeared to attempt to advance a position at litigation that once it realized it had jeopardized its position and then changed its initial responses to discovery responses concerning the meaning intended by "retail enterprise facility" to a meaning more convenient to its evolving litigation strategy, evidently North County just should have packed up its bags and gone home. (North County found especially entertaining the pre-filed testimony of Kathryn Allison and Charles Bartholomew in which they claimed to attempt to divine amongst themselves the meaning of what Ms. McKernan meant by the phrase "retail enterprise facility," rather than simply calling her or sending her an e-mail to ask her what she meant. Ultimately, these two came up with a policy against doing something which is not possible, but prohibited, but which is prohibited because it is not possible.) The Commission expressed significant scepticism over the voluntary amendment to the interrogatory, before finally rejecting it outright. Tr. 484, 485, 607-615.

interconnected when it was told the day before it filed this litigation that it would not be receiving any special exceptions in the future leads to only one acceptable conclusion: it received the special exception ***because of*** this litigation!

- (e) This policy decision was made at the highest level. Steven H. Hartmann is Verizon's Senior Counsel in Washington D.C. for all the Verizon territories coast to coast.

At the risk of belaboring the obvious, it could not be clearer that the policy exists from the highest levels of the organization on down. It exists in Mr. Hartmann's mind. It exists in Ms. McKernan's mind. It exists in the minds of the long string of e-mail recipients who did nothing to disabuse Ms. McKernan of any notion that she was wrong. And it exists in Illinois among upwards of 997 out of 1,000 carriers who interconnected with Verizon at dedicated facilities as opposed to shared end-user facilities.[6] Tr. 539-541. Why this is vitally important to the Commission is ably explained by North County's expert, Douglas Dawson. This dichotomy of wholesale/retail distinctions exists only with Verizon and no other incumbent, resulting in a system in which CLECs market entry is delayed, if not prevented, costs associated with the construction of dedicated facilities are ultimately passed on to consumers in the form of rate increases, and the requirement of interconnection at any technically feasible point, as selected by the CLEC and required by the Telecommunications Act of 1996 and the Illinois Public Utilities Act, is ultimately swept under the rug as a mere inconvenience. Tr. 425-425, 451. Ill. P.U.A. § 13-801. 47 U.S.C. § 251 (b) (5).

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[6] While North County recognizes the sometimes dismissive nature of Ms. Allison's response to questioning, North County also recognizes Ms. Allison's inability to refrain from laughing at Judge Showtis's questioning of her. Tr. 603. A witness's attitude and demeanor toward the proceedings are relevant considerations to be given toward weighing her creidibility.

III.

AT A MINIMUM, VERIZON IS GUILTY OF

UNREASONABLE CONDUCT, IF NOT WORSE.

Even if the Commission were to ignore all of the foregoing and conclude otherwise concerning the existence of Verizon's policy of only interconnecting at dedicated entrance facilities, whether with other carriers or only as 'special treatment" for North County, by no stretch of the imagination does this let Verizon off the hook. Even if the Commission were somehow to take everything Verizon put forth regarding this issue at face value, a more compelling case for negligent and unreasonable conduct would be hard to imagine.

Ms. McKernan never communicated her alleged foul-up to Mr. Lesser and never communicated her alleged foul-up to the West Virginia PSC in her pre-filed testimony in that proceeding. During this hearing, Ms. McKernan refused to concede that North County could rely on the information she was sending him. Tr. 657-658. (This testimony was inconsistent with that which she gave during the West Virginia hearing. Tr. 658-661.) Despite this, in a truly interesting and poignant choice of words, Ms. McKernan pleaded "guilty" to "playing telephone." Tr. 653. "Telephone" is a parlor game in which one individual gives a message to another player, who then passes it on to the next person, until the message makes its way around to the person who started the message; the humor in the game lies in seeing how close the final message delivered to the originator of the message and the actual original message are to each other. The Commission needs to fully appreciate that while the world of telephone is just a game to Verizon, there is nothing funny about what happened to North County, or to Illinois consumers, the ultimate victims of Verizon's games.

When asked by Judge Albers why she felt comfortable using phrases that she wasn't 100% familiar with when trying to explain things to someone who was relying on the information she provided, Ms. McKernan replied, "I don't have a really good answer for that, I really don't know." Tr. 693. Eventually Ms. McKernan acknowledged that if she had some alleged confusion, perhaps the better course would have been to put technical support directly in contact with Mr. Lesser. Tr. 697-698. This conduct alone falls far below the "reasonable" standard. Ms. McKernan also attempted to convey a lack of adequate training by her employer to enable her to perform her duties in a competent manner, with no additional training being provided since the time her difficulties with North County arose and became a matter of public record. Tr. 694-697, 698-699. Putting a poorly-trained, ill-equipped salesperson as the keeper of the gate to a technical network through which North County must pass if it is to compete effectively, as Congress, the Illinois Legislature and this Commission have previously decided was North County's right, and then providing her with no further training is an affront to the citizens of Illinois and is the hallmark of an unreasonable impediment to the development of competition. Ill. P.U.A. § 13-514.

IV

THE WEST VIRGINIA DECISION ON THE POLICY QUESTION IS DESERVING OF NO WEIGHT IN THIS PROCEEDING.

Verizon Illinois expended considerable effort in bringing the West Virginia Public Service Commission's decision regarding the "policy" question to the Commission's attention; in light of Verizon's motion to strike based upon extra-jurisdictional activities, this is particularly odd, especially considering the success Verizon had in keeping relevant factual testimony in other proceedings from the

Commission. Ultimately, an extra-jurisdictional decision without the necessary facts before this Commission is deserving of no weight whatsoever. The Commission appears ready to refrain from affording the decision considerable weight, inasmuch as the decision is on appeal. Tr. 447. Even Verizon's own witness, Ms. Allison, recognizes that each independent state commission operates under its own rules and regulations, and they may not be the same from state to state. Tr. 527. Further reason exists to afford no weight to the West Virginia conclusion is the complete and utter absence of any discussion whatsoever regarding Mr. Hartmann's letter to Mr. Dicks expressing Verizon's policy concerning the use of dedicated entrance facilities; no mention of the letter will be found in any discussion, finding of fact, or conclusion of law, despite it being the *only* exhibit attached to Verizon's cross-complaint in West Virginia. The decision is probative of nothing on this critical issue.

V.

THE COMMISSION MUST AWARD NORTH COUNTY

THE ATTORNEY'S FEES IT INCURRED IN PROSECUTING THIS ACTION.

Section 13-516 (a) of the Illinois Public Utilities Act gives the Commission the authority to order a telecommunications carrier which violates section 13-514 to cease and desist its violation. It also requires that "The Commission shall award damages, attorney's fees and cost to any telecommunications carrier that was subjected to a violation of Section 13-514."

The record in this case and the foregoing portions of this post-hearing brief show beyond any doubt that Verizon's actions, whether the result of a deliberate policy decision–which North County maintains–directed to all Illinois CLECs or just to North County, or the result of a poorly trained account manager who was authorized to speak for and bind Verizon Illinois, fall into the category of

prohibited "actions which impede competition." While section 13-516 (b) gives the Commission the authority to waive the imposition of penalties under subdivision (a) (2), if it makes written findings as to its reasons for waiving the penalties, the Legislature chose not to grant the Commission the authority to refrain from awarding attorney's fees under subdivision (a) (3) where it finds a violation of section 13-514. Attorney's fees must be awarded in this action without exception in favor of North County.

The reasons for this provision could not be clearer. A more extreme David-versus-Goliath battle would be difficult to uncover. Verizon Illinois even attempted to portray an alleged absence of CLEC complaints against Verizon as somehow being indicative of something, although what remained unclear. A small CLEC, like North County, should not have to jeopardize its marketing budget, let alone its very survival, because it is necessary to initiate litigation, as the insistence of Verison's counsel, in order to get Verizon Illinois to comply with its obligations under the Illinois Public Utilities Act and the Telecommunications Act of 1996. Undoubtedly, other competitors simply chose to absorb Verison's way of doing business and not fight, while others did not have the financial wherewithal to fight at all. The significance of North County bringing to the Commission's attention Verison's "way of doing business," (however the Commission eventually elects to categorize it) cannot be overstated. The very nature of this battle and the significant benefit which it imparts to the Illinois telecommunications market demonstrates conclusively the importance of awarding this CLEC its attorney's fees; without such, there would never be a level playing field in Illinois.

VI.

CONCLUSION.

Based upon the foregoing, NORTH COUNTY COMMUNICATIONS CORPORATION respectfully submits that the Commission should find that the actions of VERIZON NORTH, INC. and VERIZON SOUTH, INC. violated the provisions of § 13-514 of the Illinois Public Utilities Act, that VERIZON NORTH, INC. and VERIZON SOUTH, INC. should immediately cease and desist their violations, and that NORTH COUNTY COMMUNICATIONS CORPORATION should be awarded its attorney's fees incurred in this litigation, pursuant to §13-516 (a) (3), with directions for the submission of the amount of its attorney's fees claim to be determined by the Commission in a post trial briefing for that purpose.

A ruling short of awarding North County its attorneys fees sends a clear message to Verizon and the citizens of Illinois that it is O.K. for a big corporation to lie and try to use its monopoly status to put its competitors out of business. Verizon sent a letter to North County saying to, "Sue us." Verizon then filed testimony saying that North County jumped the gun and it had no idea why it was sued. Verizon then tried to cover up the letter by trying to get it excluded from the record.

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This is not O.K. This is wrong. If Verizon is not held to account for its behavior, it will do it again, all to the detriment of competition, fair play and the best interests of the Citizen's of Illinois.

Respectfully submitted.

NORTH COUNTY COMMUNICATIONS CORPORATION

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CERTIFICATE OF SERVICE

I, Joseph G. Dicks, hereby certify that I served a copy of the following document: NORTH COUNTY COMMUNICATIONS CORPORATION'S INITIAL CLOSING BRIEF upon the parties stated below by email on December 23, 2003.

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